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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 629

MRS. DAVID A. BUCKLEY, *Petitioner*,

v.

J. YANCEY CHRISTMAS, *Respondent*.

MOTION AND PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND SUPPORTING BRIEF.

HARVEY L. RABBITT,
Attorney for Petitioner.

SUSAN BRANDEIS,
JACOB H. GILBERT,
Of Counsel.

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IN THE

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OCTOBER TERM, 1941.

No. .....

MRS. DAVID A. BUCKLEY, *Petitioner*,

v.

J. YANCEY CHRISTMAS, *Respondent*.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI BEFORE PRINTING RECORD.

Comes now the petitioner by her attorney, Harvey L. Rabbitt, and moves this Honorable Court for leave to file the attached petition for writ of certiorari, to the Circuit Court of Appeals for the Fourth Circuit, prior to the printing of the record on certiorari and for cause of such motion respectfully shows:

The record in the court below consisted of the pleadings, proceedings and opinion in the District Court, and a complete transcript of all the testimony adduced and exhibits, all of which record, together with the proceedings and opinion of the Circuit Court of Appeals, has been certified to this Court by the court below.

The court below stayed the mandate to the District Court until September 22nd, pending the filing of the petition for writ of certiorari in this Court.

The petition for certiorari assigns errors in the decision of the court below which raises only questions of law, and your petitioner believes that it will not be necessary to print the whole record on the petition for certiorari in this Court, and has endeavored to stipulate with counsel for the respondent as to the parts of the record to be printed, which it is believed are sufficient for a consideration of the errors assigned in the petition, said parts of the record being as follows:

1. Bill of complaint filed in District Court.
2. Defendant's answer and counterclaim.
3. Plaintiff's replication and answer to counterclaim.
4. Plaintiff's exhibit number 5.
5. Opinion and findings of the District Court.
6. Judgment of the District Court.
7. Petition for appeal to Circuit Court of Appeals.
8. Assignment of errors.
9. Order allowing appeal.
10. Opinion of the Circuit Court of Appeals.
11. Order denying petition for rehearing.
12. Order of July 26, 1941 staying mandate.

A copy of the proposed petition for certiorari and stipulation as to the parts of the record to be printed have been tendered counsel for the respondents, and they have refused to stipulate as to the record to be printed before a copy of the petition for certiorari has been officially served upon them.

WHEREFORE, it is respectfully prayed that an order be issued by this Court authorizing the filing of the attached petition for certiorari pending a stipulation between counsel or settlement of the question of the record to be printed.

Respectfully submitted,

HARVEY L. RABBITT,
Attorney for Petitioner.

SUSAN BRANDEIS,
JACOB H. GILBERT,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ——.

IN THE MATTER OF

MRS. DAVID A. BUCKLEY, *Petitioner,*

—against—

J. YANCEY CHRISTMAS, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, MRS. DAVID A. BUCKLEY, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered on July 22, 1941, affirming a judgment of the District Court for the District of Maryland for $4,764.90, rendered in favor of the respondent and against your petitioner in an action brought on an open account.

SUMMARY STATEMENT OF MATTER INVOLVED.

FACTS.

The petitioner, the owner of a farm devoted to the breeding of race horses, placed with respondent a number of her horses to be trained and prepared by him for racing at the various eastern race tracks (R. 223). The respondent brought an action against your petitioner in the Superior Court of Baltimore City, which was removed by petitioner to the United States District Court for the District of Maryland (R. 2). Respondent's action was based upon an open account amounting to $4,988.90, for services rendered and expenses incurred by him as trainer of petitioner's race horses. Petitioner in her answer denied being indebted to respondent and set up five counterclaims, the aggregate of which exceeded respondent's aforesaid claim (R. 4). The District Court, without a jury, disallowed all of petitioner's counterclaims, and rendered judgment allowing respondent's claim as stated, less the sum of $224.00 (R. 214).

Petitioner's first counterclaim alleged respondent's indebtedness to her in the sum of $1,500.00 arising from the sale by her and the purchase by respondent of the mare "Cleaning Time" (R. 4).

In rejecting this counterclaim the District Judge held that there was no agreement of sale for $1,500.00, but that the mare was in the possession of respondent, under an "on the cuff" arrangement, which permitted the respondent to pay for said mare out of earnings and purses won in races in which she ran. The District Court, as stated, rendered a money judgment in favor of respondent, but made no provision therein respecting said mare, the property of your petitioner (R. 213).

The Circuit Court of Appeals, in reviewing the District Court's action on this counterclaim, expressed "no opinion as to the present or future rights and liabilities of the parties to this suit with respect to the mare 'Cleaning Time' ", stating also that the respondent had not shown that his possession was a "gift" or "bailment so that he could con-

tinue to train and race her or for any other purpose" (R. 225).

In dismissing petitioner's third counterclaim, involving a charge of $1,500.00 for three services of petitioner's stallion "Grand Time" to respondent's mare plus the sum of $25.00 for transportation expenses, the District Judge allowed in evidence over your petitioner's objections and exceptions, a written agreement (Exhibit 5) relating to said stud services alleged to have been made with her agent (R. p. 191) the authority to make, or the actual existence, of such agreement having been denied by petitioner (R. p. 207).

In admitting said Exhibit 5, the District Court, upon the ground that a written instrument could not be varied by a verbal agreement, rejected petitioner's evidence of a verbal agreement requiring respondent to pay $500.00 for each service rendered (R. p. 207).

The respondent testified that it was understood between the parties at the time of the sale of the stallion "Grand Time" he was to have free service of the stallion (R. p. 207).

The Circuit Court of Appeals found that said written agreement (Exhibit 5) was inadmissible, holding, nevertheless, that a dismissal of this counterclaim was not erroneous under Rule 52(a) of the Rules of Civil Procedure (R. p. 226).

QUESTIONS PRESENTED.

(1) Where in an action on an open account for moneys due plaintiff, as a trainer of horses, a counterclaim interposed by the defendant, the owner of the horses, alleging in reduction of the trainer's claim the sale of a mare, is dismissed for failure to prove such sale and the plaintiff is sustained in his claim that the mare was to be paid for out of her earnings, is a judgment awarded to plaintiff which does not make provision for the satisfaction of the future training expenses and the payment of the mare out of her

winnings, or in lieu thereof, provide for its return or the payment of its reasonable value, a proper judgment?

(2) Did the Circuit Court of Appeals in recognizing that the possession of the horse, which was the subject matter of the counterclaim, was not a gift nor a bailment for the purpose of training her "or for any other purpose", err in holding that the property, the horse in question, was not a matter for decision by the District Court?

(3) Where the Circuit Court of Appeals holds a written agreement inadmissable and the District Court in erroneously admitting such written agreement, refuses to consider petitioner's evidence of an independent verbal agreement based on the District Court's misapplication of the rule of law that oral testimony of an independent agreement may not be used to vary the express terms of a written agreement, and where the Circuit Court of Appeals sustains the findings of fact and conclusions of law of the District Court, by reason of an independent verbal agreement, testified to by the respondent, but fails to consider petitioner's version of said verbal agreement because of the erroneous exclusion of such evidence by the District Court, as aforesaid, is Rule 52(a) of the Federal Rules of Civil Procedure properly applied by the Circuit Court of Appeals, and is its decision correct that such findings of fact and conclusions of law were not "clearly erroneous" within the meaning of said Rule 52(a), notwithstanding such errors relate to matters of law?

(4) Do the matters raised in Question "3", above, by reason of the failure of the District Court and the Circuit Court of Appeals to consider petitioner's evidence, due to a mistake in law, constitute a denial of due process?

REASONS FOR GRANTING THE WRIT.

The question of a judgment in conformity with the issues raised in a judicial proceeding, is an important question and involves a denial of due process.

The question here of a proper judgment is substantial since it relates to counterclaims where property rights are put in issue.

The decision of the Circuit Court of Appeals raises two issues affecting the function and purpose of counterclaims in judicial proceedings.

(a) The counterclaim is substantially a cross action by defendant against plaintiff, and gives defendant the full relief accorded by a separate action. Although the pleadings and trial in the instant case placed in issue the ownership of the mare, "Cleaning Time", for the purpose of reducing respondent's claim, and petitioner's ownership was affirmed therein, the judgment entered herein fails to make provision in protection of such ownership.

The ruling of the Circuit Court of Appeals leaves suspended the present and future property rights of your petitioner although it requires her to pay in accordance with the judgment rendered the amount recovered by respondent.

(b) Under the decision of the Circuit Court of Appeals, in view of the issues of ownership, sale, possession and custody of the mare, "Cleaning Time", involved in the trial had in the District Court, the remedy of an independent and second action, which said decision intimates, sanctions a practice of multiplicity of actions in defeat of the purposes and objects of counterclaims, and jeopardizes petitioner's assertion of her property rights through judicial proceedings in a single action, in contravention of the Fifth Amendment.

Other grounds for granting certiorari herein are furnished by the holding of the Circuit Court of Appeals, that notwithstanding error found in the admission of a written agreement made with petitioner's alleged agent, such error did not require a reversal of the judgment, but that the judgment could be affirmed under Rule 52(a) of the Federal Rules of Civil Procedure, where the facts found by the Trial Judge indicate another verbal agreement made with the principal (petitioner), although in arriving at such finding

he weighed and considered said written agreement, and upon the ground that an independent agreement cannot be used to vary the terms of a written agreement, refused to consider petitioner's version of said verbal agreement. Accordingly, here also, there is raised an important question involving a denial of due process.

WHEREFORE, it is respectfully submitted that this petition should be granted.

HARVEY L. RABBITT,
Attorney for Petitioner.

SUSAN BRANDEIS,
JACOB H. GILBERT,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

MRS. DAVID A. BUCKLEY, *Petitioner,*

v.

J. YANCEY CHRISTMAS, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS BELOW.

The findings and opinion of the District Court are found in R. 197-213.

The opinion in the Circuit Court of Appeals is reported in 121 Fed. (2d) 323, and is found at R. 222-227.

The petition to the Circuit Court of Appeals for rehearing was made and denied without opinion, On July 22, 1941.

GROUNDS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347(a). The order affirming the judgment of the District Court and denying the petition for rehearing was entered July 22, 1941 (R. 245). An order

staying the mandate until September 22, 1941, pending an application for a writ of certiorari to this Court was entered August 22, 1941, by the Circuit Court of Appeals.

RULES INVOLVED.

Rules 13(b), 52(a), 54(b) and 54(c) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), are set out in an appendix at pages 24 to 27.

STATEMENT.

The statement of the case already given in the petition under the heading, "Summary Statement of Matter Involved" is hereby adopted and made a part of this brief.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred in finding that:

1. The reasonable value of the mare, "Cleaning Time", unless returned to petitioner, was not the subject of an offset.

2. The return of the mare, "Cleaning Time", and an accounting of her earnings was the subject matter of an independent cause of action between the parties.

3. The transactions between petitioner and respondent did not require an adjudication affecting the return, possession and future earnings of the mare, "Cleaning Time".

4. The petitioner was not entitled to an offset requiring respondent to return the mare, "Cleaning Time", or in lieu thereof to a deduction of the mare's reasonable value upon payment of the judgment herein.

5. The petitioner's counterclaim did not put in issue the repossession of the mare "Cleaning Time" or in lieu thereof the payment of its reasonable value.

6. The denial of petitioner's "First" counterclaim was not erroneous under Rule 52(a) of the Federal Rules of Civil Procedure.

7. The error in the admission of the written agreement, Exhibit 5, did not warrant a reversal of the judgment herein.

8. There was a verbal understanding between the parties for free stud services of the stallion "Grand Time".

9. The denial of petitioner's "Third" counterclaim was not erroneous under Rule 52(a) of the Federal Rules of Civil Procedure.

10. In affirming the judgment of the District Court.

SUMMARY OF THE ARGUMENT.

The points of the brief are summarized in the Subject Index.

ARGUMENT.

Point I.

Petitioner's "first" counterclaim placed in issue all matters pertaining to the ownership of the mare, "Cleaning Time," and a complete adjudication of the issues raised by the pleadings and at the trial required the rendition of a conclusive judgment disposing of such issues, including the property rights of the parties in the said mare. Accordingly, the Circuit Court of Appeals erred in failing to remand the cause to the District Court for the entry of a judgment in accordance with such issues and proper findings in support thereof.

Upon this phase of the case, the pleadings, consisting of counterclaim and answer, raising the issue of ownership and sale respecting "Cleaning Time", follow:

The counterclaim reads:

> "The Plaintiff is indebted to the Defendant in the sum of $1500.00 for the purchase of the mare 'Cleaning

Time' on or about August 26, 1939, which the Plaintiff purchased from the Defendant and of which sum no part has been paid." (R. p. 4.)

The answer states:

"In August, 1939, the Defendant instructed the Plaintiff to sell the mare 'Cleaning Time' for which he would receive a ten per cent (10%) commission. The Plaintiff was unable to obtain a purchaser and was forced to keep her to pay expenses. The mare broke down and the Plaintiff has continued to pay all expenses, etc." (R. p. 6.)

The decision of the Circuit Court of Appeals sustaining the District Court's finding, whereby the mare, after the deduction of training expenses, was to be paid for out of her earnings, is stated as follows:

"He explained that this arrangement was understood by both parties to mean that he would buy the mare on condition that he would be allowed to pay for her out of winnings and that her value would be determined by what she had run for in order to win a race. He further testified that the expenses of the mare amounted to more than her winnings, and his testimony was not contradicted. He still has the mare in his possession, and has raced her several times." (R. p. 224.)

The decision goes on to state by inference that your petitioner has a remedy as to her future rights and liabilities, stating:

"We express no opinion as to the present or future rights and liabilities of the parties to this suit with respect to the mare "Cleaning Time'." (R. p. 225.)

Your petitioner submits that this is an erroneous interpretation of the issues as tried and raised by the pleadings, more particularly as to her counterclaim under Rule 13(b), providing:

"A pleading may state as a counterclaim any claim against an opposing party not arising out of the trans-

> action or occurrence that is the subject matter of the opposing party's claim." (Appendix p. 24.)

Moreover, the Circuit Court of Appeal's interpretation is in direct conflict with the spirit and purpose of Rule 13 which was enacted mainly to discourage separate actions and to encourage the disposition of litigation in one action.

> *Moore* v. *New York Cotton Exchange*, 270 U. S. 593.
> *Schram* v. *Ducking*, 31 Fed. Supp. 749.
> *Carter Oil Co.* v. *Wood*, 30 Fed. Supp. 875.

In conformity with Rule 54(c) petitioner by way of relief, is entitled to a proper judgment covering the entire situation as developed by the facts and evidence adduced at the trial, regardless of whether she asked for such relief in her counterclaim, since the Rule provides that,

> "* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." (Appendix p. 26.)

In *Keiser* v. *Walsh*, 118 Fed. (2d) 13, 14 App. D. C., the Court, in reversing a judgment dismissing a complaint, held that under Rule 54(c) it was not required to consider whether proper relief had been asked for, but applied the test that "any relief which the court can grant", should be accorded, saying:

> "We need not consider whether appellant has asked for the proper relief. By Rule 54(c) of the Federal Rules of Civil Procedure '* * * every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.' Accordingly as complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to any relief which the court can grant. Reversed."

To the same effect is *Downey* v. *Palmer*, 114 Fed. (2d) 116, C. C. A. Second.

In consequence of the decision of the Circuit Court of Appeals, petitioner is placed in the anomolous position of being confronted with a money judgment against her, although the judgment creditor (respondent) is indebted to her by reason of the possession and control of her property, the mare in suit, the value of which respondent fixed at between $1,000.00 and $1,500.00 (R. p. 197).

The result arrived at is the more astonishing since the Circuit Court of Appeals was moved in making its decision by the fact that the earnings of "Cleaning Time" gave petitioner "future rights" which could not be adjudicated at the time of the trial (R. p. 222).

Adopting the Circuit Court's reasoning of "future rights", we find that Rule 54(b) of the Federal Rules of Civil Procedure provides for the happening of future events and specifically meets the contingency of an accounting at some future date while permitting, at the same time, adjudication of existing rights between the parties.

Rule 54(b) reads as follows:

> "(b) *Judgment at Various Stages.* When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." (Appendix, p. 26.)

Under this rule, a judgment could have been entered for your petitioner defining the respective rights of your petitioner and respondent to "Cleaning Time" by reason of the "on the cuff" arrangement. The rule would permit the judgment to "prescribe such conditions as are necessary

to secure the benefit thereof" and would also permit the issuance of a stay to await the outcome of the earnings of "Cleaning Time", and, further, pending such outcome proper provisions could be made in protection of your petitioner's property rights in and ownership of the mare "Cleaning Time" which, in default thereof, would require its return or payment of the reasonable value.

All this, which the above quotation of the rule indicates, would not interfere with the entry in the meantime of a judgment in favor of respondent on his main claim of an open account.

Your petitioner, therefore, submits that the Circuit Court of Appeals, in not following the practice established by the Federal Rules of Civil Procedure herein indicated, has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, which did not render a judgment respecting the mare "Cleaning Time", as provided under said rules, as to call for an exercise of this court's power of supervision, (Rule 38(5b) of the Rules of the Supreme Court), and further, the error complained of, constitutes a denial of due process. As was said in *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 519, "In judicial proceedings, due process of law requires notice, hearing and judgment."

Point II.

The error respecting the written agreement (exhibit 5) cannot be cured by the ruling of the Circuit Court of Appeals that said written agreement is inadmissible, and that the judgment dismissing petitioner's "third" counterclaim can be sustained under rule 52(a) by the finding of an independent verbal agreement, since the error basically involves a failure to consider petitioner's evidence as to her version of said verbal agreement and a denial of due process.

In holding Exhibit 5 inadmissible for failure of proof of agency, the Circuit Court of Appeals said:

> "No evidence was introduced in proof of Furr's purported agency and this fact rendered the written memorandum of agreement inadmissible as evidence against appellant." (R. p. 225.)

Motions to have Exhibit 5 rejected as evidence and stricken from the record were made and all were denied by the District Judge.

In sustaining the dismissal of petitioner's "third" counterclaim involving the services of the stallion "Grand Time" amounting to $1500.00, the Circuit Court of Appeals affirmed the action of the District Judge upon respondent's version of a verbal agreement to the effect that it was understood by all parties that he was to have free stud services, the Court saying:

> "However, the opinion of the District Court shows that its finding was not based upon the written memorandum, but rather upon the oral evidence of appellee, who testified that it was understood by all parties, and was a part of a consideration for the sale of the stallion "Grand Time," that appellee was to have free service of the stallion" (R. p. 208).

Petitioner's evidence as to said verbal agreement on the other hand, was that there was to be no charge for two services for the years 1935, 1936 and 1937, but since three addi-

tional services were taken during the years 1938, 1939 and 1940, there was due her from respondent $500.00 for each service or a total sum of $1500.00 for said three additional services (R. p. 208).

The error of the Circuit Court of Appeals arose from the following finding of the District Judge, wherein and whereby, in admitting the written agreement (Exhibit 5) held inadmissible on Appeal, the District Judge would not and the Circuit Court, in turn, did not consider petitioner's evidence as to the verbal agreement upon which her "third" counterclaim was based:

> "True, the clause in the written agreement upon which plaintiff relies is itself ambiguous. If we assume that Furr had authority to sign on behalf of the defendant, and if he were here to testify, it would be permissible to have him give his interpretation of the clause, just as an attempt was made by the Court to obtain the plaintiff's interpretation of the clause, it is capable, of course, of an interpretation to the effect that the stallion should be brought to the mares free of any transportation expenses only, and not free of stud fees. Since mares are usually brought to the stud, and not the stud to the mare, this is not a totally unreasonable interpretation. Also, plaintiff's interpretation makes the free services of indefinite duration. But in the light of the other circumstances in the present case, I think defendant's interpretation is the less reasonable one. In other words, defendant's own conduct, in never acting in accordance with such interpretation over such a long period of time, negatives her right to such interpretation, or *to have the alleged verbal understanding displace this written one*" (Italics ours) (R. p. 208).

Thus, the District Court found that respondent's evidence of a written agreement with petitioner's purported agent, offered in defense to petitioner's "third" counterclaim, was ambiguous. It then accepted petitioner's evidence for the sole purpose of interpreting the ambiguity involved in said written agreement. In so limiting petitioner's evidence, the District Court found that such evi-

dence established an independent verbal agreement, and in applying the rule of law that a verbal independent agreement cannot be used to vary the express terms of a written agreement, if held that it would not consider her evidence, or in the language of the court "... negatives her right ... to have the alleged verbal understanding displace this written one."

The record clearly shows that petitioner denied the making of any written agreement or, if made, that Furr had no such authority, and, therefore, objected to its introduction and consideration in the evidence.

Moreover, petitioner's evidence established an independent verbal agreement between the principals as distinguished from the written agreement made with respondent and your petitioner's alleged agent; hence, such evidence was never offered by petitioner to interpret the ambiguity of the alleged written agreement between petitioner's agent and the respondent.

But, the use, to clarify an ambiguity of said written agreement, to which the District Court limited petitioner's evidence,—a mistake in applying the law—resulted in it being completely ignored and given no effect.

The Circuit Court of Appeals correctly held that the written agreement was inadmissible as evidence against petitioner (R. p. 226) and, in eliminating it as a basis for the District Court's finding, looked to respondent's oral testimony to sustain said finding, giving petitioner's evidence no consideration, for the District Court had originally rejected it and had so stated its rejection in its findings.

Accordingly, such evidence, having been rejected by the District Court in the light of the written agreement, was not reinstated by the Circuit Court in spite of its holding of error on the part of the court below in admitting said written agreement. In summary, there is thus presented the unusual situation of petitioner's evidence being disregarded by the District Court, and further disregarded by the Circuit Court of Appeals.

Since the error of the District Court was in connection with a vital and important question of law, Rule 52(a)—applicable to findings of fact only—should not and could not be invoked; yet, the Circuit Court made use of this Rule to justify a finding which clearly calls for appellate relief, and a reversal of the judgment of the District Court.

The question of due process is brought to the fore by reason of the fact that although petitioner was permitted to adduce evidence at the trial, such evidence, however, was never considered either by the District Court or the Circuit Court of Appeals; and, in consequence thereof, as a matter of law, prejudicial error was committed in connection with a vital and important question of law.

Since the District Judge in the making of a finding of a verbal agreement, which the Circuit Court of Appeals approved, used Exhibit 5—an incompetent document which should not have been in evidence—and gave it the legal effect of being unimpeached by the evidence adduced by petitioner, the following observation of the Court in *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 Fed. (2d) 704, 706, C. C. A. Third, that a finding of fact resting "upon an erroneous conception of the pertinent law," is not a fact found, is peculiarly appropriate:

> "It is also to be noted that one of the trial court's findings (No. 13) respecting the difficulty of the legal problem confronting the plaintiff, as defendant's counsel, rested not upon fact but upon matter of law. The relative importance of this finding is obvious. It undoubtedly influenced in no small measure, the trial court's appraisal of the extent and value of the plaintiff's services. Consequently, if the particular finding rests upon an erroneous conception of the pertinent law, its effect was harmful."

Equally applicable is the rule based upon the opinion of Mr. Chief Justice Fuller in *Crawford* v. *Neal*, 144 U. S. 585, 596, relating to the extent of appellate review of findings of fact and conclusions of law, as follows:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman* v. *Proctor*, 125 U. S. 136; *Kimberly* v. *Arms*, 129 U. S. 512; *Evans* v. *State Bank*, 141 U. S. 107."

In making its decision, the Circuit Court of Appeals apparently ignored a previous decision made by it in *Beckley Nat. Bank et al.* v. *Boone et al.*, 115 Fed. (2d) 515, 516, where, in following *Crawford* v. *Neal, supra*, the Court said:

"In making this investigation, we must adhere to the rule that an appellate court will not disturb the findings of a special master, confirmed by a district judge, upon a disputed question of fact, unless a very plain mistake has been made (Citing cases).

"But as this court has said previously, the findings of a special master, as approved by the judge below, though entitled to weight, are persuasive only and not controlling. The review in this court is a real review and not a perfunctory approval. Crawford v. Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. Ed 649; National Manufacture & Store Corp v. Whitman, 4 Cir., 93 F. (2d) 829; see also Hoeltke v. C. M. Kemp Mfg. Co., 4 Cir., 80 F. (2d) 912, and Standard Acc. Ins. Co. v. Simpson, 4 Cir., 64 F. (2d) 583. See also 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c."

Petitioner submits she has overcome the presumption on appeal of the correctness of the findings of fact and conclusions of law by showing that not only was incompetent evidence (Exhibit 5), considered, but that the legal effect of such incompetent evidence resulted in the judgment dismissing petitioner's "third" counterclaim.

CONCLUSION.

It is therefore respectfully submitted that the errors in law of the court below, vitally affecting judicial proceedings, and the plain equities and justice of this case call for the exercise by this court of its supervisory powers and that to such an end a writ of certiorari should be granted herein.

Respectfully submitted,
HARVEY L. RABBITT,
Attorney for Petitioner.

SUSAN BRANDEIS,
JACOB H. GILBERT,
Of Counsel.

APPENDIX.

RULE 13. *Counterclaim and Cross-Claim.*

"(a) *Compulsory Counterclaims.* A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

"(b) *Permissive Counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

"(c) *Counterclaim Exceeding Opposing Claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

"(d) *Counterclaim Against the United States.* These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

"(e) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

"(f) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

"(g) *Cross-Claim Against Co-Party.* A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom

it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

"(h) *Additional Parties May Be Brought in.* When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

"(i) *Separate Trials; Separate Judgments.* If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

U. S. C. A. Title 28, Rule 13 Of The Federal Rules of Civil Procedure, pp. 471, 472.

RULE 52. *Findings by the Court.*

"(a) *Effect.* In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necesary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

"(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions

tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

U. S. C. A., Title 28, Rule 52 of The Federal Rules of Civil Procedure, p. 677.

RULE 54. *Judgments; Costs.*

"(a) *Definition; Form.* 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

"(b) *Judgment at Various Stages.* When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

"(c) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

"(d) *Costs.* Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the

prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

U. S. C. A., Title 28, Rule 54 of The Federal Rules of Civil Procedure, pp. 695, 696.

FILED
OCT 18 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 629.

MRS. DAVID A. BUCKLEY,
Petitioner,

vs.

J. YANCEY CHRISTMAS,
Respondent.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI BEFORE PRINTING RECORD, AND PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENT, IN OPPOSITION TO MOTION AND PETITION FOR A WRIT OF CERTIORARI.

E. MILTON ALTFELD,
Attorney for Respondent.

MALCOLM J. COAN,
Of Counsel.

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MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI BEFORE PRINTING RECORD.

In her Motion, Mrs. David A. Buckley alleges that the petition for certiorari assigns errors which raise only questions of law, and therefore she believes that

it will not be necessary to print the whole record on the petition for certiorari in this Court. Actually, your respondent submits that both of the questions raised by the petition for certiorari are questions of fact, and, therefore, it will be necessary to print the evidence relative thereto on the petition for certiorari.

Moreover, petitioner herself, on page 4 of the brief filed on her behalf in her appeal to the Circuit Court of Appeals, admitted that the questions arising on both First and Third Counterclaims (which represent the questions raised in her Petition for Certiorari) involved purely a question of fact, the contention of the Appellant being that the findings of the lower Court upon the Defendant's First and Third Counterclaims should be set aside because *clearly* erroneous under Rule 52(a) Federal Rules of Civil Procedure.

In the Petitioner's offer of stipulation, she omitted all evidence relative to said first and third counterclaims. Otherwise, and aside from this omission, your respondent immediately agreed to stipulate that the contents of the record should be the twelve items set forth on page 2 of said Motion and Petition. Counsel for respondent flatly and unequivocally deny that they refused to stipulate as to the record to be printed before a copy of the petition had been officially served on them, but they did refuse to stipulate that the evidence as to the first and third counterclaims be omitted, unless and until a carbon copy of a petition for certiorari had been served on them from which they might confirm petitioner's oral representations that the Petition would not raise such questions of fact.

WHEREFORE, it is respectfully submitted for the Respondent herein, that this Court refuse to authorize the filing of said petition for certiorari, without a printed copy of the record of evidence relative to the two questions of fact raised by said petition.

E. MILTON ALTFELD,
Attorney for Respondent.

MALCOLM J. COAN,
Of Counsel.

QUESTIONS PRESENTED.

In her Petition for Certiorari (pp. 7-8) Mrs. David A. Buckley, in her statement of the questions presented in this Honorable Court for decision, specifies four questions which are not in such form as to express the actual and essential questions presented.

The actual questions presented to and decided by the Court below were:

1. What amount, if anything, was due the petitioner on her first counterclaim relating to the transaction between herself and the respondent as to the mare "Cleaning Time"?

2. What amount, if anything, did the respondent agree to pay the petitioner for the services of the stallion "Grand Time", sold by the former to the latter, and made the subject of petitioner's third counterclaim?

STATEMENT.

The statement contained in the Petition for Certiorari is, it is respectfully submitted, incomplete and therefore the Respondent submits the following statement of facts:

The proceeding in the District Court was by the Respondent on an open account amounting to $4,988.90 for services rendered and expenses incurred by him as trainer of Petitioner's race horses (R. 3). Petitioner in her Answer disputed some of the items in said open account and in addition filed five (5) counterclaims aggregating $8,188 (R. 6). The District Court, without a jury, disallowed all of Petitioner's counterclaims, and rendered judgment allowing Respondent's claim as

stated, less the sum of $224.00, which Respondent had conceded (R. 214).

Petitioner appealed to the Circuit Court of Appeals on the correctness *vel non* of the District Court's refusal to allow her first and third counterclaims, designating same as involving questions of fact only (Appellant's Brief, p. 4).

Petitioner's first counterclaim alleged Respondent's indebtedness to her in the sum of $1,500, representing the purchase price on an alleged sale by her to Respondent of the mare "Cleaning Time" (R. 4). The Respondent denied ever having purchased said mare, and alleged Petitioner had sold said mare to him "on the cuff" for a price to be determined in the future by what she had to run for in order to win a race.

The District Court, in refusing said counterclaim, found that there never was any sale of said mare for $1,500, a flat price of $1,500, but that the arrangement was "on the cuff", as claimed by the Respondent (R. 213).

The Circuit Court of Appeals affirmed this finding of fact, and noted that Respondent's testimony that the expenses of the mare was more than her earnings was not contradicted (R. 224). The Circuit Court of Appeals found that at the time the suit was instituted nothing was in fact due on said counterclaim (R. 225).

Petitioner's third counterclaim was for the sum of $1,500 allegedly due for three services at $500 each of Petitioner's stallion "Grand Time". Respondent flatly denied any such agreement, and contended these services were to be free of charge, as a part of the consideration for the sale of this stallion by the Respondent to the Pe-

titioner. The District Court admitted in evidence a written memorandum relating to said free stud services, but disregarding said memorandum, decided the issue in favor of the Respondent on his testimony and on disbelief in Petitioner's testimony (R. 191).

The Circuit Court of Appeals held said written memorandum was inadmissible, but noted that the opinion of the District Court shows its finding was not based upon the written memorandum, but rather on the oral testimony of the Respondent, and further noted that the District Court gave weight to the circumstance that Petitioner during the long period of time in which Respondent's claim was made and the institution of this suit had made no mention of the claim she now makes for the services of this stallion (R. 208). The Circuit Court of Appeals thereupon held that in accordance with Rule 52(a) of the Rules of Civil Procedure, they could not say that the action of the District Court in refusing to allow Petitioner's third counterclaim was clearly erroneous, and accordingly affirmed the judgment of the District Court (R. 226).

ARGUMENT.

POINT I.

THE CIRCUIT COURT OF APPEALS HELD, AS DID THE DISTRICT COURT, THAT AT THE TIME RESPONDENT'S SUIT WAS INSTITUTED, THE PETITIONER WAS NOT ENTITLED TO ANY OFFSET, AS AGAINST RESPONDENT'S CLAIM, BY REASON OF THEIR TRANSACTIONS UP TO THAT TIME CONCERNING THE MARE "CLEANING TIME", THE SUBJECT OF PETITIONER'S "FIRST" COUNTERCLAIM.

In refusing to allow Petitioner's first counterclaim, the District Court said:

> "The first one relates to a claim growing out of the purchase by plaintiff from defendant of a mare

called Cleaning Time. All of the negotiations, conversations and arrangements appear to have been verbal in connection with this transaction, or by letter. There was no formal agreement. I am not impressed with the contention of defendant that plaintiff agreed to pay her a flat price of $1,500. Plaintiff's contention is that, while the whole matter was admittedly handled in a very loose manner, with a good deal of 'backing and filling', what finally happened was that, after trying to sell the mare for the defendant at various agreed prices, and after the mare's track performances were not up to original expectations, he offered to take her, speaking in the vernacular of the track, 'on the cuff'; namely, that he would not have to stand to lose anything out of his own pocket; that if there were no net winnings there would be no payment; and that plaintiff agreed to this arrangement. While neither side is to be defended for entering into such a loose agreement, we do not have to go to the race track to find that sort of thing being done every day, by persons who then come into court and try to get the court to tell them what their rights are. This transaction was admittedly of an extremely unbusiness-like character, but after weighing the evidence I feel that the plaintiff's story is the one that is entitled to credence and that there was no agreement whereby the plaintiff was bound absolutely, as the defendant claims, to pay $1,500 for the purchase of the mare Cleaning Time. While some prima facie inference to the contrary might be reasonable, on account of the change in registration of the mare from the defendant's name to that of plaintiff's wife, such inference is overcome by other circumstances in the case, including the long delay on the part of the defendant in asserting this claim. This matter of delay on defendant's part I will refer to again." (R. 213.)

The Circuit Court of Appeals, in affirming the District Court's refusal of said first counterclaim finding same not clearly erroneous and therefore under Rule 52(a) U. S. C. A. refusing to disturb said finding of fact, said:

> "The transaction between appellant and appellee with reference to the mare 'Cleaning Time' is not made entirely clear by the evidence. In the same letter whereby appellant's employment as trainer was terminated, appellant requested appellee to try to sell this mare for '$1,500, if possible; if not, $1,250,' offering him ten percent sales commission if he should make such sale. Appellee was unable to make a sale of the mare and subsequently, in a telephone conversation with appellant, entered into an arrangement with her whereby, as appellee testified, he bought the mare 'on the cuff'. He explained that this arrangement was understood by both parties to mean that he would buy the mare on condition that he would be allowed to pay for her out of winnings and that her value would be determined by what she had to run for in order to win a race. He further testified that the expenses of the mare amounted to more than her winnings, and this testimony was not contradicted. He still has the mare in his possession, and has raced her several times. Appellant's testimony as to the transaction concerning the mare 'Cleaning Time' differs in many respects from that of appellee. She testified that appellee agreed to buy the mare and to pay $1,500.00 as the purchase price; but her testimony agrees with that of appellee in that both say it was a condition of the purchase that appellee would be permitted to pay for the mare out of winnings; and she made no claim against appellee for any sum by reason of the transaction respecting the mare 'Cleaning Time' until after the suit was instituted." (R. 224.)

The Circuit Court then further found that it was not necessary to pass on the present or future rights and liabilities of the parties to this suit, with respect to this counterclaim.

> "It suffices to say that at the time this suit was instituted appellant was not entitled to any offset, as against appellee's claim, by reason of their transactions up to that time concerning the mare 'Cleaning Time'."

Under such a state of facts, would the Circuit Court of appeals be required to hold up the appellee's right to a judgment for the amount due him, until the lapse of months, or maybe years, so as to determine the future financial result of the racing of this mare?

Petitioner is in error in contending that Rule 54(b) of the Federal Rules of Civil Procedure applied to the refusal of this counterclaim. Said rule applies only where the plaintiff has more than one claim in his action. As soon as all the issues to any one of the plaintiff's several claims, and *all counterclaims arising out of the transaction or occurrences, which is the subject matter of the claim,* the Court may enter a judgment disposing of such claim. The rule then provides that the Court may stay the execution of such judgment *until the entering* of a subsequent judgment.

Obviously, said rule has no application to a case of several counterclaims, as to one of which counterclaims, the Court, as it did in regard to Petitioner's "first" counterclaim, finds nothing to have been due at the time of the institution of the suit.

Point II.

THE ERROR RESPECTING THE ADMISSION OF THE WRITTEN AGREEMENT (EXHIBIT 5) WAS RENDERED HARMLESS BY THE FACT THAT THE DISTRICT COURT EXPRESSLY DISREGARDED SAID AGREEMENT, AND BASED ITS DISMISSAL OF PETITIONER'S "THIRD" COUNTERCLAIM, ON ITS BELIEF IN RESPONDENT'S TESTIMONY IN REGARD THERETO AND DISBELIEF IN PETITIONER'S TESTIMONY, AND THE CIRCUIT COURT OF APPEALS, WHILE HOLDING SAID WRITTEN AGREEMENT INADMISSIBLE, AFFIRMED SAID FINDING OF FACT UNDER RULE 52(A) OF THE RULES OF CIVIL PROCEDURE.

The District Court admitted in evidence Exhibit 5,—the written agreement (R. 191).

The District Court's opinion furthermore shows it attached little value to said written agreement; characterizing it as ambiguous. The District Court said:

> "However, I do not think it necessary to rest a denial of this counterclaim upon this contract. I am satisfied from the statement of Mr. Christmas, which I believe is entitled to credence, that there was really never any understanding that these particular services were to be charged for. That is evidenced by the fact that no charges were ever made of a similar nature, and the present claim was never asserted until the commencement of this suit" (R. 207).

The District Court did not, as the Brief supporting the Petition for Certiorari herein contends, limit the use of Petitioner's evidence to the clarification of the alleged written memorandum, but on the contrary, considered said evidence, and disbelieved it especially because it had the earmarks of being a recent fabrication.

The opinion filed by the Circuit Court of Appeals (R. 208) fully supports the above version of the District Court's opinion:

> "However, the opinion of the District Court shows that its finding was not based upon the written memorandum, but rather upon the oral evidence of the appellee, who testified that it was understood by all parties, and was a part of the consideration for the sale of 'Grand Time', that appellee was to have free service of the stallion. Furthermore, the District Court gave weight to the circumstance that during all the period of time which elapsed between appellee's discharge as trainer and the institution of this suit, appellant made no mention of the claim she now alleges for services of this stallion, although during that period appellee was making continuous efforts to get a settlement of his account from appellant."

The attempt, on page 19 of Petitioner's Brief, to make capital out of the words "displace this written one" in the opinion of the District Court, is, we submit, disingenuous. To begin with, said words are merely illustrative. This is obvious in the light of the preceding paragraph of the District Court's opinion and findings hereinabove discussed.

The District Court, in the preceding paragraph, had declined to base its opinion on the written contract, but instead accepted the statement of Mr. Christmas "that there was really never any understanding that these particular services were to be charged for".

The Court thereafter used the language quoted on p. 19 of Petitioner's Brief, wherein it reverts to said alleged written agreement, only to declare it ambiguous, and proceeds to demonstrate its uncertainty assuming

Furr had authority to sign, and was present to testify as to its meaning. Finally, the District Court again concludes that Defendant's present interpretation as to what the understanding between the parties was is negatived by her own conduct in never acting in accordance with such interpretation over such a long period of time.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondent herein, that the Motion and Petition of Mrs. David A. Buckley for a Writ of Certiorari should be denied.

E. MILTON ALTFELD,
Counsel for Respondent.

MALCOLM J. COAN,
Of Counsel.